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No. 79-1238

In the Supreme Court of the United States

OCTOBER TERM, 1979

ANTHONY BRIGGS, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner contends that the denial of his application for voluntary departure from the United States deprived him of due process because it was based on hearsay information contained in an FBI report of which he had no notice prior to the deportation hearing.

1. Petitioner, a citizen of Great Britain, entered the United States on September 8, 1977, as a non-immigrant visitor and overstayed his authorized visit. On that ground, petitioner was served with a Notice of Hearing and Order to Show Cause why he should not be deported from the United States (R. 55).[1]

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[1] "R." refers to the certified administrative record.

At the hearing before an immigration judge, petitioner admitted deportability but requested voluntary departure (R. 39, 41). During questioning by the INS attorney, petitioner admitted to having had "an unfortunate financial experience" in Great Britain (R. 42). In response to the INS attorney's assertion that he had information regarding petitioner's involvement in a theft of 4,271 British pounds (approximately $8,000), petitioner admitted having been questioned about the matter by British police officers, having been informed by the police that they would want to talk to him again in a few days, and nevertheless having left for the United States before a second interview could take place (R. 44). Petitioner denied, however, having committed theft or having been formally summoned to appear in magistrate's court to answer a charge of theft (R. 42-45).

At that point in the proceedings, the government offered an FBI report into evidence (R. 45-46). The report stated that the FBI's legal attache in London had been advised by the South Yorkshire police department that petitioner was wanted for the theft of 4,271 British pounds, that he had failed to appear in magistrate's court on October 14, 1977, and that a warrant for his arrest had been issued on that date (R. 60). The report also stated that the South Yorkshire police were anxious to learn of any prosecutive or deportation action taken against petitioner since he would be arrested upon his return to Great Britain (*ibid.*). In response to the proffer, petitioner's counsel remarked (R. 47):

> we would have no objection to that document being admitted into evidence so long as it would only go to his listing of his true name, his physical description, other than his alias, and the fact that the FBI has information that he is being charged with a certain crime in England. We are in no way admitting that any of those allegations are true and correct.

The immigration judge admitted the report "[w]ith counsel's statement in mind" (R. 48).

Thereafter, petitioner denied that he had left Great Britain in order to avoid having to appear in connection with the theft charge. He asserted that his trip to the United States had been planned and that he had made airplane reservations before the financial matter arose. When asked why he had not delayed his departure in order to clear up the matter, petitioner responded that he felt he was being victimized and could accomplish nothing by staying. He also asserted that the matter was inflated, that he disputed the amount stated in the FBI report and that he was willing to make restitution for what he in fact owed (R. 48-49).

The immigration judge held that, in order to qualify for voluntary departure, petitioner had to establish that he had been a person of good moral character for at least the past five years, that he was willing to depart the United States voluntarily and at his own expense and that he was worthy of voluntary departure in the exercise of discretion (Pet. App. B 3). Petitioner's admission that he had departed for the United States without notifying the South Yorkshire police despite being advised that they would want to speak with him again convinced the immigration judge that petitioner was a fugitive from justice and that he was therefore neither willing to leave the United States voluntarily nor deserving of voluntary departure (*id.* B 3-4).

The denial of voluntary departure was upheld by the Board of Immigration Appeals (Pet. App. C). The court of appeals affirmed by memorandum order (Pet. App. A).

2. Petitioner's claim that the admission of the FBI report denied him due process is without merit. Contrary to petitioner's contention that the report was the "sole evidence" on which he was denied voluntary departure (Pet. 2, 6-7, 11), the opinion of the immigration judge clearly demonstrates that he relied instead on petitioner's own testimonial admissions, most of which were made prior to the introduction of the FBI report. Moreover, any claim that those admissions were made in response to the disclosure of the information contained in the report was waived by petitioner's stipulation that the report could be received to show that "the FBI has information that he is being charged with a certain crime in England."

In any event, the admission of the FBI report was not error. Voluntary departure is a form of discretionary relief (8 U.S.C. 1254(e)). It is an " 'act of grace' " that " 'cannot be demanded as a right.' " *Jay* v. *Boyd*, 351 U.S. 345, 354, 356 (1956). Therefore, the determination whether to grant voluntary departure is not governed by the strict rules of evidence. *Ibid.* Indeed, even in a case unlike this one, in which deportability is at issue, hearsay evidence may be admitted if it is probative and if its use is fundamentally fair. *Hoonsilapa* v. *INS*, 575 F. 2d 735, 738 (9th Cir. 1978). See generally *Morgano* v. *Pilliod*, 299 F. 2d 217, 219 (7th Cir.), cert. denied, 370 U.S. 924 (1962).[2] In light of the nature and source of the information contained in the FBI report and its substantial corroboration by petitioner's own testimony, these tests were clearly satisfied in this case.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1980

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[2]Petitioner's reliance on *Bridges* v. *Wixon*, 326 U.S. 135 (1945), is misplaced. In that case, the Court held that an individual who had resided in the United States for 18 years could not be deported involuntarily on the ground of membership in the Communist Party on the basis of hearsay evidence admitted in violation of INS's own regulations. Here, the agency complied with its rules, and petitioner's "roots [have not] become * * * deeply fixed in this land." 326 U.S. at 154.

[3]There is no merit to petitioner's claim that the admission of the FBI report violated the notice requirement of the Due Process Clause. As petitioner recognizes, *Aalund* v. *Marshall*, 461 F. 2d 710 (5th Cir. 1972), expressly held that due process does not require INS to give notice of the grounds on which it intends to contest an application for voluntary departure. *Chlomos* v. *United States Department of Justice, Immigration and Naturalization Service*, 516 F. 2d 310 (3d Cir. 1975), which involved the right to the assistance of retained counsel at a deportation hearing, has no relevance to the present case.